

**Letter of Findings: 04-20110350
Sales and Use Tax
For the Years 2008-2009**

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ISSUES

I. Sales and Use Tax – Imposition.

Authority: IC § 6-2.5-1-1; IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-2.5-5-8; IC § 6-8.1-5-1; [45 IAC 2.2-5-15](#).

Taxpayer protests the imposition of sales and use tax on its purchase of tangible personal property.

II. Sales and Use Tax – Imposition.

Authority: IC § 6-2.5-4-9; [45 IAC 2.2-3-8](#); [45 IAC 2.2-3-9](#).

Taxpayer protests the imposition of sales and use tax on its purchases of materials used in construction projects.

STATEMENT OF FACTS

Taxpayer is an Indiana corporation engaged in the business of building and remodeling residential homes. After an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer owed sales and use tax and assessed interest for the tax years 2008 and 2009. Taxpayer purchased items for installation in the homes. The Department found that Taxpayer had neither paid sales tax at the time of purchase nor remitted use tax to the Department on these purchases. Taxpayer protests this imposition of use tax and interest. An administrative hearing was conducted and this Letter of Findings results. Further facts will be provided as required.

I. Sales and Use Tax – Imposition.

Taxpayer states that it paid sales tax, which was included in the invoice at the time of purchase.

Pursuant to IC § 6-8.1-5-1(c), all tax assessments are presumed to be accurate, and the taxpayer bears the burden of proving that an assessment is incorrect.

IC § 6-2.5-2-1 provides:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

IC § 6-2.5-3-2(a) states:

An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

Accordingly, Indiana imposes a sales tax on retail transactions and a complementary use tax on tangible personal property that is stored, used, or consumed in the state. IC § 6-2.5-1-1 et seq. An exemption from the use tax is granted for transactions where the gross retail tax ("sales tax") was paid at the time of purchase pursuant to IC § 6-2.5-3-4. Since Taxpayer failed to pay sales tax at the time of purchase, the Department found that the purchases were subject to use tax.

The Department refers to [45 IAC 2.2-5-15](#), which clarifies the purchase for resale exemption, as follows:

- (a) The state gross retail tax shall not apply to sales of any tangible personal property to a purchaser who purchases the same for the purpose of reselling, renting or leasing, in the regular course of the purchaser's business, such tangible personal property in the form in which it is sold to such purchaser.
- (b) General rule. Sales of tangible personal property for resale, rental or leasing are exempt from the tax if all of the following conditions are satisfied:

- (1) The tangible personal property is sold to a purchaser who purchases this property to resell, rent or lease it;
 - (2) The purchaser is occupationally engaged in reselling, renting or leasing such property in the regular course of his business; and
 - (3) The property is resold, rented or leased in the same form in which it was purchased.

(c) Application of General rule.

- (1) The tangible personal property must be sold to a purchaser who makes the purchase with the intention of reselling, renting or leasing the property. This exemption does not apply to purchasers who intend to consume or use the property or add value to the property through the rendering of services or performance of work with respect to the property.

(2) The purchaser must be occupationally engaged in reselling, renting or leasing such property in the regular course of his business. Occasional sales and sales by servicemen in the course of rendering services shall be conclusive evidence that the purchaser is not occupationally engaged in reselling the purchased property in the regular course of his business.

(3) The property must be resold, rented or leased in the same form in which it was purchased.

IC § 6-2.5-5-8(b) provides for an exemption from sales tax for purchases of tangible personal property that are purchased to be resold in the Taxpayer's ordinary course of business.

The Department assessed use tax on Taxpayer's purchase of supplies on February 5, 2009, and March 3, 2009, from the general door vendor in the amount of \$598 and \$374. The Department noted that there was "no tax on invoice." Thus, the Department audit determined that Martin's Overhead Door did not collect the sales tax and Taxpayer is responsible for use tax. Although Taxpayer asserted that sales tax was included in the invoice, Taxpayer also failed to provide documentation to support its protest. Given the totality of the circumstances, in the absence of other supporting documentation, the Department is not able to agree that Taxpayer met its burden of proving that the Department's assessment was wrong. Since Taxpayer did not pay sales tax at the time of its purchase, use tax is properly imposed.

FINDING

The Taxpayer's protest is respectfully denied.

II. Sales and Use Tax – Imposition.

DISCUSSION

Taxpayer protests the assessment of sales and use tax on construction materials consumed in a lump sum contract by its subcontractor.

Pursuant to IC § 6-2.5-4-9(a):

(a) A person is a retail merchant making a retail transaction when the person sells tangible personal property which:

- (1) is to be added to a structure or facility by the purchaser; and
- (2) after its addition to the structure or facility, would become a part of the real estate on which the structure or facility is located.

[45 IAC 2.2-3-9](#) states in relevant part:

(a) A contractor may purchase construction material exempt from the state gross retail tax only if he issues either an exemption certificate or a direct pay certificate to the seller at the time of purchase.

(b) A contractor who purchases construction material exempt from the state gross retail tax or otherwise acquires construction material "tax-free" is accountable to the Department of Revenue for the state gross retail tax when he disposes of such property.

...

(e) Disposition subject to the use tax. With respect to construction materials a contractor acquired tax-free, the contractor is liable for the use tax and must remit such tax (measured on the purchase price) to the Department of Revenue when he disposes of such property in the following manner:

- (1) He converts the construction material into realty on land he owns and then sells the improved real estate;
- (2) He utilizes the construction material for his own benefit; or
- (3) Lump sum contract. He converts the construction material into realty on land he does not own pursuant to a contract that includes all elements of cost in the total contract price.

(Emphasis added).

[45 IAC 2.2-3-8\(a\)](#) states:

(a) In general, all sales of tangible personal property are taxable, and all sales of real property are not taxable. The conversion of tangible personal property into realty does not relieve the taxpayer from a liability for any owing and unpaid state gross retail tax or use tax with respect to such tangible personal property.

(Emphasis added).

Taxpayer asserts that it hired a subcontractor to perform its construction work on a lump sum basis. Taxpayer mentions that the subcontractor purchased the construction materials from a vendor to incorporate into real property as part of the lump sum contract. During the protest process, Taxpayer submitted an invoice from the subcontractor and copies of invoices where the subcontractor purchased the raw materials used in the project. The invoices from the subcontractor showed that the subcontractor paid sales tax on the construction materials at the time of purchase. Therefore, Taxpayer has provided sufficient evidence to establish that the construction materials were not subject to sales and use tax.

FINDING

Taxpayer's protest is sustained.

CONCLUSION

While Taxpayer's protest of the sales and use tax assessment on Issue I is denied, its protest of the sales and use tax assessment on Issue II is sustained.

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